

FILED
For Abington
NOV 04 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

JOHN F. CONNORAN, CLERK
BY: *[Signature]*
DEPUTY CLERK

UNITED STATES OF AMERICA)

)

Case No. 1:04CR00071

)

v.)

OPINION AND ORDER

)

RANDY SCOTT RADER,)

By: James P. Jones

)

Chief United States District Judge

Defendant.)

Randy Scott Rader, Pro Se Defendant.

The defendant has filed a "Motion for Reduction in Sentence Pursuant to Amendment 709," in which he seeks to reduce his sentence because of a later amendment to the U.S. Sentencing Guidelines. The motion will be denied.

The defendant was sentenced by this court on June 14, 2006, to 180 months imprisonment. He asserts that he is entitled to a sentence reduction because thereafter the Sentencing Commission adopted Amendment 709 to the Sentencing Guidelines, altering the manner in which certain prior convictions may be counted in calculating a defendant's criminal history category. *See* U.S. Sentencing Guideline Manual ("USSG") app. C supp., amend. 709 (Nov. 1, 2007). According to the defendant, if this amendment were applied to him, he would be eligible for a reduction in sentence pursuant to 18 U.S.C.A. § 3582(c)(2) (West 2000).

Amendment 709 is not listed in the applicable Sentencing Commission policy statement, USSG § 1B1.10 (2008). Unfortunately for the defendant, the law of this circuit is that only amendments so listed may be the subject of a motion under 18 U.S.C.A. § 3582(c)(2). *United States v. McHan*, 386 F.3d 620, 622 (4th Cir. 2004). Where a case is on direct appeal and a clarifying amendment is effective after sentencing, the amendment may be applied retroactively, *see United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995), but that rule does not apply to a later collateral motion under § 3582(c)(2).

For the foregoing reasons, it is **ORDERED** that the defendant's motion (#125) is DENIED.

ENTER: November 4, 2009

/s/ JAMES P. JONES
Chief United States District Judge